United States Senate
Washington, DC 20510

February 14, 2012

The Honorable Eric Holder
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Wahington, DC 20530

Dear Attorney General Holder:

On December 12, 2011 the Supreme Court issued an order inviting the Solicitor General to provide the views of the United States on two petitions challenging the Ninth Circuit Court of Appeals' ruling overturning longstanding U.S. Environmental Protection Agency (EPA) regulations regarding the application of the Clean Water Act (CWA) to silvicultural activities. We write to urge you to support EPA's regulations of forest roads and other forest management activities as nonpoint sources and support review by the Supreme Court of the Ninth Circuit decision.

For 35 years, the EPA, through both Democratic and Republican presidencies, prudently recognized that forest roads and other forest management activities are non-point sources under the CWA and are most appropriately regulated through Best Management Practices at the state level. Congress and the courts have consistently supported this interpretation.

The Ninth Circuit's decision to reinterpret these provisions of the CWA imposes unprecedented and onerous regulatory burdens on private, state, tribal, and federal forest managers and the agencies that regulate them. Furthermore, it exposes forest managers and operators as well as state and federal agencies to CWA-based lawsuits that could impair critical work to improve watersheds, reduce fire risk, maintain forest access and support family-wage jobs in struggling rural communities.

Last December Congress passed, and the President signed, H.R. 2055, the omnibus appropriations bill, which included language preserving EPA's existing regulations under the CWA for fiscal year 2012. This provision, which was based on House and Senate bills with strong bipartisan support in both chambers, demonstrates strong congressional support for maintaining EPA's regulations and reversing the position of the Ninth Circuit Court of Appeals.

We urge you to uphold 35 years of regulatory interpretation by defending the nonpoint source designation of forest roads and silviculture practices and seek Supreme Court review of the Ninth Circuit's decision.

Sincerely,

/s/
Ron Wyden
United States Senator

/s/
Mike Crapo
United States Senator

/s/
Kay R. Hagan
United States Senator

/s/
Roy Blunt
United States Senator

/s/
Joe Manchi III
United States Senator

/s/
Saxby Chambliss
United States Senator

/s/
Mary L. Landrieu
United States Senator

/s/
Olympia J. Snowe
United States Senator

/s/
Mark Begich
United States Senator

/s/
Pat Roberts
United States Senator

/s/
Claire McCaskill
United States Senator

/s/
Roger F. Wicker
United States Senator

/s/
Jeanne Shaheen
United States Senator

/s/
Susan M. Collins
United States Senator

/s/
Mark L. Pryor
United States Senator

/s/
David Vitter
United States Senator

/s/
Amy Klobuchar
United States Senator

/s/
Michael B. Enzi
United States Senator

/s/
Herb Kohl
United States Senator

/s/
James E. Risch
United States Senator

/s/
John Boozman
United States Senator

/s/
Thad Cochran
United States Senator

/s/
Lindsey Graham
United States Senator

/s/
Richard Burr
United States Senator

/s/
Patrick J. Toomey
United States Senator

/s/
Marco Rubio
United States Senator

Congress of the United States
Washington, DC 20515

February 14, 2012

Mr. Jack Lew
White House Chief of Staff
1600 Pennsylvania Ave., NW
Wahington, DC 20500

Dear Mr. Lew:

As sponsors of H.R. 2541, the Silviculture Regulatory Consistency Act, we are writing you to encourage the Administration to defend before the Supreme Court EPA's 35 year interpretation that forest roads should be regulated as nonpoint sources under the Clean Water Act (CWA). As you know, the Supreme Court recently asked for the views of the federal government on this issue because of a decision by the Ninth Circuit Court that reversed this proven and longstanding practice.

We support our states and their rigorous oversight of forest roads through the use of Best Management Practices (BMP). BMPs are environmentally proven and responsible approaches for regulating runoff that allow states to appropriately address unique, local forest management challenges – as opposed to one size fits all National Pollutant Discharge Elimination Systems (NPDES) permits under the CWA.

Requiring CWA permits for forest roads would impose unprecedented and onerous regulatory burdens on states and forest owners and operators that would seriously threaten sound forest management and the many good paying jobs it supports. Furthermore, the Ninth Circuit's decision would subject private, tribal, state and federal forest management to debilitating citizen lawsuits. Given the benefits to watersheds, the increased forest access, the reduced forest fire risk, and the hundreds of thousands of rural jobs that come with responsible forest management, we can ill afford to effectively shut down forest production under a court-imposed regulatory requirement that runs counter to 35 years of success.

Congress has consistently supported the EPA's existing regulations and state BMPs because they provide an approach to water quality management that works. The Ninth Circuit Court's decision to unilaterally reinterpret the CWA is inconsistent with good public policy and contrary to congressional intent. We introduced H.R. 2541 to codify EPA's existing forest roads rule into law, and a similar provision was included in the 2011 Omnibus Appropriations Act. This legislation, which enjoys bipartisan support from members representing nearly every forested state, is a clear rebuttal to the Ninth Circuit and a strong reaffirmation of congressional support for EPA's longstanding interpretation of forest roads regulation under the CWA.

As the administration prepares its views for presentation to the Supreme Court by the Solicitor General, we strongly urge you to fully defend EPA's existing rule and seek to overturn the Ninth Circuit's erroneous interpretation of the Clean Water Act and EPA's policy.

Sincerely,

/s/
Jaime Herrera Beutler
Member of Congress

/s/
Kurt Schrader
Member of Congress

/s/
Greg Walden
Member of Congress

/s/
Collin Peterson
Member of Congress

/s/
Doc Hastings
Member of Congress

/s/
Sanford Bishop Jr.
Member of Congress

/s/
Bob Goodlatte
Member of Congress

/s/
Bennie Thompson
Member of Congress

/s/
Cathy McMorris Rodgers
Member of Congress

/s/
Tim Holden
Member of Congress

/s/
Glenn Thompson
Member of Congress

/s/
G.K. Butterfield
Member of Congress

/s/
Thomas Petri
Member of Congress

/s/
Mike Michaud
Member of Congress

/s/
Shelley Moore Capito
Member of Congress

/s/
Mike McIntyre
Member of Congress

/s/
Sue Myrick
Member of Congress

/s/
Larry Kissell
Member of Congress

/s/
Jo Ann Emerson
Member of Congress

/s/
John Barrow
Member of Congress

/s/
Dave Reichert
Member of Congress

/s/
Mike Ross
Member of Congress

/s/
Walter Jones Jr.
Member of Congress

/s/
Dan Boren
Member of Congress

/s/
Mike J. Rogers
Member of Congress

/s/
William Owens
Member of Congress

/s/
Cynthia Lummis
Member of Congress

/s/
Terri Sewell
Member of Congress

/s/
Robert Aderholt
Member of Congress

/s/
Jeff Duncan
Member of Congress

/s/
Alan Nunnelee
Member of Congress

/s/
Lynn Westmoreland
Member of Congress

/s/
Raul Labrador
Member of Congress

/s/
Jeff Denham
Member of Congress

/s/
Bill Huizenga
Member of Congress

/s/
Robert Wittman
Member of Congress

/s/
Mick Mulvaney
Member of Congress

/s/
Reid Ribble
Member of Congress

/s/
Marthy Roby
Member of Congress

/s/
Tim Walberg
Member of Congress

/s/
Brett Guthrie
Member of Congress

/s/
Sean Duffy
Member of Congress

/s/
Vicky Hartzler
Member of Congress

/s/
Dan Benishek
Member of Congress

/s/
David McKinley
Member of Congress

/s/
Renee Ellmers
Member of Congress

/s/
Morgan Griffith
Member of Congress

CC: Lisa Jackson, Administrator of the Environmental Protection Agency
Tom Vilsack, Secretary of the United States Department of Agriculture
Ken Salazar, Secretary of the United States Department of the Interior

State of Arkansas
The Attorney General
Dustin McDaniel
323 Center Street, Suite 200
Little Rock, Arkansas 72201

January 31, 2012

Donald B. Verrilli, Jr.
Solicitor General
950 Pennsylvania Ave., NW
Wahington, DC 20530-0001

Re: Decker v. NEDC, Nos. 11-338, 11-347

Mr. Verrilli,

The State of Arkansas writes on behalf of the *Amici Curiae* States, who filed a brief in this case on October 14, 2011, along with the other interested states listed below. On December 12, 2011, the United States Supreme Court invited the Solicitor General to submit the views of the United States on this issue. The States ask that you carefully consider the impact this case has on the States when making your decision. Amici states urge the Solicitor General to support the grant of certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each indi-

vidual state in favor of the CWA's NPDES permit program.

EPA's approach that channeled precipitation from forest management and timber harvesting roads should be managed as a non-point source of pollution has been consistently upheld by other courts. The Solicitor General should urge the Court to grant certiorari because the decision of the Ninth Circuit is at odds with the decisions of other circuits and threatens the consistent interpretation upon which EPA, the states, and the forest industry have relied since the inception of the CWA.

The Amici States ask the Solicitor General to consider the long term application of the Silviculture Rule, the impact this sudden change would have on the States, as well as EPA, and the departure from previous case law that the change represents. This issue will fundamentally impact the state programs that have been developed and enforced based upon the long term application of the Silviculture Rule. After a review of these issues we request the Solicitor General urge the Supreme Court to grant certiorari for this case.

Congress enacted the Clean Water Act ("CWA") in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See, e.g. Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation"). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of

pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft ***." 33 U.S.C. § 1362(14). This permitting program is the National Pollutant Discharge Elimination System (NPDES) permitting program.

EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when Permits are and are not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include nonpoint source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff.* However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209, 120 and part 233) (emphasis added).

40 C.F.R. § 122.27. EPA has consistently maintained that, pursuant to this rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976). State agencies charged with implementing the CWA have followed EPA's lead, and the clear language of the Silvicultural Rule, and have managed runoff from timber harvest roads as non-point sources of pollution.

Congress recognized that runoff from timber harvesting operations and forest roads, if improperly managed, can result in a significant degradation of water quality. Congress also recognized that management of non-point source activities is best handled by state and local government. To address the issue of non-point source runoff, Congress enacted 33 U.S.C. § 1329. This law requires all states to develop best management practices and programs (BMPs) for non-point source pollution and report to EPA the BMPs that are being utilized within a state to reduce, and in some instances eliminate, water pollution from non-point sources. *See*, 33 U.S.C. § 1329.

Again, the Amici states urge the Solicitor General to support the grant of certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each individual state in favor of the CWA's NPDES permit program. We welcome the opportunity to discuss the States' concerns further with you. Thank you for your time and consideration of this matter.

Sincerely,

/s/
Dustin McDaniel
Arkansas Attorney General

/s/
Luther Strange
Alabama Attorney General

/s/
Lawrence G. Wasden
Idaho Attorney General

/s/
Richard A. Svobodny
Alaska Acting Attorney General

/s/
Greg Zoeller
Indiana Attorney General

/s/
Pamela Jo Bondi
Florida Attorney General

/s/
James D. "Buddy" Caldwell
Louisiana Attorney General

/s/
Samuel S. Olens
Georgia Attorney General

/s/
Catherine Cortez Masto
Nevada Attorney General

/s/
Derek Schmidt
Kansas Attorney General

/s/
Michael A. Delaney
New Hampshire Attorney General

/s/
Jack Conway
Kentucky Attorney General

/s/
Mike DeWine
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/s/
William J. Schneider
Maine Attorney General

/s/
E. Scott Pruitt
Oklahoma Attorney General

/s/
Bill Schuette
Michigan Attorney General

/s/
Linda L. Kelly
Pennsylvania Attorney General

/s/
Jim Hood
Mississippi Attorney General

/s/
Alan Wilson
South Carolina Attorney General

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Chris Koster
Missouri Attorney General

/s/
Marty J. Jackley
South Dakota Attorney General

/s/
Steve Bullock
Montana Attorney General

/s/
Gregory A. Phillips
Wyoming Attorney General

/s/
Robert E. Cooper, Jr.
Tennessee Attorney General

/s/
Greg Abbott
Texas Attorney General

/s/
Mark L. Shurtleff
Utah Attorney General

/s/
Kenneth T. Cuccinelli, II
Virginia Attorney General

/s/
Robert M. McKenna
Washington Attorney General

/s/
Darrell V. McGraw, Jr.
West Virginia Attorney General